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In the

# Supreme Court of the United States

October Term, 1940.

No. 35.

KANSAS CITY, MISSOURI, a Municipal Corporation,
*Petitioner,*

vs.

L. SINGER & SONS ET AL., *Respondents.*

*On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.*

## PETITIONER'S BRIEF.

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## PETITIONER'S BRIEF.

### I.

### OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit appears in the record beginning at page 33. This opinion is reported in 109 Fed. (2d) 493. The opinion of the Federal District Court for the Western District of Missouri appears in the record beginning at page 25 and is reported in 26 Fed. Supp. 721.

## II.

## JURISDICTION.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 28 U. S. C. A. 347).

## III.

## STATEMENT OF THE CASE.

### Nature of the Case.

L. Singer & Sons *et al.*, being commission merchants in Kansas City, Missouri, brought suit to enjoin the Union Pacific Railroad Company from building and operating an extension of its railroad consisting of a produce terminal and appurtenant trackage in Kansas City, Kansas, until such time as it had applied for and obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require the construction and operation of said extension as required by the so-called Transportation Act of 1920.[1] The city of Kansas City, Missouri, filed a motion for leave to intervene as a plaintiff upon the ground that it is entitled to jointly maintain the action as a "party in interest" under paragraph (20) of Section 1 of the so-called Transportation Act.

### Complaint of L. Singer & Sons *et al.*

The complaint of L. Singer & Sons *et al.* (R. 1), being the produce or commission merchants seeking to enjoin the Union Pacific from building and operating the extension of its line in question, in brief alleges that Union Pacific Railroad Company proposes to construct and operate at large cost, in interstate commerce, an extension of its line of railroad which will serve a large food terminal and produce market which is to be constructed as a joint enterprise by the Union Pacific Railroad Company and the city of Kansas City, Kansas; that these

[1]Section 402, Par. (18), of the Transportation Act of 1920 [41 Stat. 456, 477; 49 U. S. C. A., Section 1, Par. (18).]

produce or commission merchants own and have places of business within and adjacent to a similar market known as the City Market of Kansas City which has long been established in Kansas City, Missouri, and which has for more than seventy-five years adequately served the two cities; and that the Kansas City, Missouri, market is now adequately served by a number of railroads. Their complaint further alleges that the change in the transportation system which will be created by the unauthorized, and therefore unlawful, extension of the line of the Union Pacific Railroad will directly and adversely affect petitioners' welfare, and cause a direct financial loss to them. This direct loss is alleged to arise as a result of the fact that the construction and operation of the proposed extension would, among other things, destroy or seriously and adversely affect the businesses, properties and large financial investments of petitioning produce merchants within and adjacent to the existing Kansas City, Missouri, market; would create a rival produce market far removed from the center of population and inconvenient to a great majority of the citizens of the two cities, without any increase in the amount of business handled and notwithstanding the fact that the present Kansas City, Missouri, market is entirely adequate; would result in unnecessary and wasteful duplication of railroad facilities, at a cost of over $500,000.00, with no increase in freight to be handled; would divert traffic to the Union Pacific Railroad from other railroads which are now adequately handling the traffic to the existing produce market; would cause destructive competition between railroads serving the two cities and impair the adequacy of their service to petitioning produce merchants; and would result in wasteful and needless expenditure by the Union Pacific Railroad Company.

**Petitioner's Motion to Intervene and Proposed Intervening Petition.**

Kansas City, Missouri, then moved to intervene as a party plaintiff (R. 5). In brief, its motion stated that there was then pending a suit by these produce or commission merchants above mentioned against Union Pacific Railroad Company, and restated substantially the allegations of that complaint, and alleged further that over a period of seventy-five (75) years there had been built up in Kansas City, Missouri, a large volume of business and a great number of merchants engaged in the business of the City Market located in Kansas City, Missouri, and that as a complement to such business there are a large number of firms in said city engaged in business connected with and bearing a direct relation to these merchants and depending upon their business, and that as a result thereof these merchants and these businesses so dependent thereon have invested in real estate, buildings, improvements and equipment in and about said market center, many millions of dollars; that said market is now and has been equipped, for many years, with more than adequate railroad and transportation service, and that the market is fully capable of serving Kansas City and its adjacent territory to which it is easily accessible by rail and hard-surfaced roadways; that the proposed plan and scheme of the Union Pacific Railroad Company is to promote the erection of a competing market center or food terminal in Kansas City, Kansas, and to build the necessary extension of its lines to serve and to be a part of the same, whereby it will be enabled to control the planned food terminal and to divert revenues from Kansas City, Missouri; and from the produce merchants engaged in their business in Kansas City, Missouri; and

to divert a large amount of freight and other revenue from Kansas City, Missouri; and to cause many of these produce merchants to remove themselves from Kansas City, Missouri, and carry on their business in the competing, planned food terminal, and thus cause direct financial loss to Kansas City, Missouri, by way of, among other things, loss of personal occupation taxes and licenses which the aforesaid businesses and persons ordinarily paid and would pay to Kansas City, Missouri; loss by way of a great depreciation of the property of the city; loss in taxes as a result of depreciation of the assessable values applicable to taxable property within the city; loss by way of reduction in value of bonds issued by Kansas City, Missouri, for construction of a new wholesale and retail market in conjunction with its present market, which new market is under construction. From all of this by necessary implication petitioner will suffer loss by impairment of the transportation system serving Kansas City, Missouri.

This motion further alleges that representation of the interest of petitioner herein by respondents is inadequate, will not unduly delay or prejudice the rights of the original parties, and contains the other necessary allegations showing the right and propriety of petitioner to intervene and maintain this action.

The intervening petition of Kansas City (R. 11) follows substantially, but in greater detail, the allegations of the motion to intervene. It specifically alleges that the unauthorized construction and operation of the proposed extension of the Union Pacific Railroad will seriously interfere with the use and operation of the tracks, loading docks and other appurtenances located in and about said City Market of Kansas City, Missouri, and used and in use by the railroads serving Kansas City, Missouri,

and Kansas City, Kansas, and will cause a material change in the transportation system in Kansas City, Missouri, and will result in loss to the City by adversely affecting business and property located therein, some of which property is owned directly by the City, and by impairing the adequacy of the present transportation system to the detriment and direct loss of petitioner, and contains numerous other allegations of direct loss to petitioner.

### Answer of Union Pacific Railroad Company.

The answer of Union Pacific Railroad Company (R. 18) asserted four defenses, the first three of which defenses are: (1) That the court had no jurisdiction over the subject matter of the action; (2) That petitioners are not parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and were not authorized to institute or maintain any action thereunder, and (3) That the complaint failed to state a claim against defendant upon which relief could be granted.

After filing answer, the Union Pacific Railroad Company made application to the court to hear and determine before trial said first three defenses (R. 22). The hearing was granted, no evidence was offered, and the case was submitted to the court on the pleadings and briefs of counsel.

### Summary of the Opinion Below.

The District Court held that it had jurisdiction of the suit (Defense No. 1), but that L. Singer & Sons and petitioner Kansas City were not "parties in interest" within the meaning of the Transportation Act and hence

could not maintain the action, and that, as a consequence, "the complaint failed to state a claim upon which any relief can be granted," and the motion of Kansas City, Missouri, to intervene as a party plaintiff therein was refused on the ground that Kansas City, Missouri, "is not a party in interest authorized to maintain or intervene in said action" (R. 23, 25).

The United States Circuit Court of Appeals for the Eighth Circuit, by a two-to-one decision, affirmed the decree of the District Court (R. 33). Senior Circuit Judge Kimbrough Stone wrote a strong dissenting opinion (R. 40).

## IV.

## SPECIFICATIONS OF ERRORS.

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that petitioner is not a "party in interest" who may intervene and maintain this action under the provisions of paragraph (20) of Section 1 of the Transportation Act (41 Stat. 478, Title 49 U. S. C. A., Sec. 1, Par. 20).

2. That said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court adjudging and decreeing that the City of Kansas City, Missouri, is not a party in interest authorized to maintain or intervene in said action, and in adjudging and decreeing that L. Singer & Sons *et al.*, original petitioners, are not parties in interest who may maintain the action.

3. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court dismissing L. Singer & Sons' complaint and refusing leave for Kansas City to maintain or intervene in said action for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act, and petitioner's motion to intervene and its proposed intervening complaint also state proper grounds for intervention and a good cause of action upon which relief can be granted under the provisions of said Transportation Act.

4. That said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court and in determining that petitioner is not a party in interest within the meaning of the Transportation Act, because such determination is contrary to the purposes of the Act, and conflicts with decisions of this Court, interpreting the meaning of said phrase, in the cases of *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

## V.

## STATUTES INVOLVED.

It is alleged in the complaint of L. Singer & Sons *et al.*, in which action petitioner seeks to intervene as a party plaintiff, that Union Pacific Railroad Company failed to secure a certificate of public convenience and necessity for the construction of the extension, as required by paragraph (18), Section 1, of the Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 18), which provides as follows:

> "(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Petitioner contends that because the Union Pacific Railroad Company failed to secure a certificate of public convenience and necessity, it is a party in interest author-

ized to intervene and maintain the action under paragraph (20) of Section 1, Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 20), which provides as follows:

> "(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance or the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest;* * * *." (Italics ours.)

## VI.

## ARGUMENT.

**1. Petitioner is a party in interest and authorized and entitled to intervene in and maintain the action under the laws of the United States, and particularly under the specific provisions of paragraphs 18 and 20 of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Sec. 1, Pars. 18 and 20).**

Paragraph 18 of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Sec. 1, Par. 20) reads, in part, as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, * * *."

Paragraph 20 of Section 1 thereof reads, in part, as follows:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest.*" (Italics ours.)

The lower court held that the petitioner is not a "party in interest" within the meaning of paragraph 20 of Section 1 of the Interstate Commerce Act because its inter-

est and rights are not directly affected by the allegedly illegal construction and operation of the trackage in and extension and connection with the New Food Terminal. In arriving at the conclusion that petitioner is not a party in interest within the meaning of the statute, the court appears to have proceeded upon the theory that the petitioner may not intervene in and maintain the suit because it does not possess such a clear legal right as would entitle it to relief under the rules commonly accepted by courts of equity. The lower courts further proceeded upon the theory that the petitioner was not and will not be directly affected by the extension in question.[2]

Neither petitioner nor this Honorable Court is concerned with the question of whether or not in the absence of the statutory provision in question, the petitioner would have no right of action. The supporting cases cited by the appellate court below and by the Union Pacific Railroad Company that concerned themselves with the right of petitioner in the absence of the statutory

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[2]United States District Court—memorandum opinion—on page 25 of the record states at 27:

> "The complaint and motion to intervene disclose that neither plaintiffs, nor the city of Kansas City, Missouri, are engaged in the transportation business. It further appears that neither the property or confines of either are touched, encroached upon or directly affected by the proposed construction of the so-called 'extensions.' There is no violation of any definite legal right alleged. Therefore, neither plaintiffs nor the City of Kansas City, Missouri, may maintain this action."

The United States Circuit Court of Appeals for the Eighth Circuit, opinion (record at page 38) states:

> "The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be (fol. 49) adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension."

provision are not authority for the conclusions reached in the majority opinion of the Circuit Court of Appeals. In the absence of the statute in question, it is clear that petitioner would have no right to intervene in and maintain this action. Prior to 1920, the Interstate Commerce Act did not contain paragraphs 18 to 22 of Section 1. These new paragraphs were added by the so-called Transportation Act of 1920. Prior to the enactment of the Transportation Act, the Interstate Commerce Act placed no restraint on competition between the railroads by way of the construction of competing lines. One line might duplicate the facilities of another regardless of whether the public necessity called for that action. The competition was unrestricted and great public waste was the result. Congress recognized that the building of unnecessary lines by the carriers, the duplication of facilities already adequate to serve the needs of the public, and unrestricted competition between carriers, was a matter in which the public had a primary interest. Congress further recognized that such unregulated action on the part of the carriers imposed a burden upon commerce directly affecting the public interest. It is the contention of petitioner that the regulations established by the so-called Transportation Act of 1920, and the remedy given for an attempted violation thereof, governs the conduct of the Union Pacific Railroad Company with respect to the matters herein referred to and gives to the petitioner because of its direct interest and because of the direct injury that petitioner alleges will result therefrom, the right to intervene and maintain this action.

In the enactment of the Transportation Act of 1920, petitioner does not believe that it was the intent of Congress to allow only competing railroads to be able to challenge by court action the unlawful conduct of a rail-

road company which attempts to make an extension of its line without having first secured a certificate of convenience and necessity. The requirement of such a certificate is to prevent economic waste and injury to the public interest which might result from unnecessary duplication of facilities, or bring about a "material change in the transportation situation" which is adverse to the public interest. On the contrary, as expressed by this Court in the case of *Western Pacific California Railroad Company* v. *Southern Pacific Company*, 284 U. S. 47, has said:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. *It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.* Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove *deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss.* It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the

matter. *The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act.*" (Italics ours.)

Thus this Court has already clearly expressed itself as saying that Section 1, paragraphs 18 to 22, of the Transportation Act of 1920 requires a certificate of convenience and necessity for extension of a railroad line and that any party in interest could enjoin a railroad proceeding to construct or use such an extension without such certificate. The Court has further said that a party in interest is not necessarily one who has some clear legal right for which it might ask for protection under the rules commonly accepted by courts of equity, but that on the contrary, so long as the bill discloses that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation, then petitioner is a party in interest and entitled to maintain a suit. The Court has recognized that although a party in interest must possess something more than a common concern for obedience to law this "something more" is supplied where petitioner is peculiarly concerned and its own welfare seriously threatened. This "something more" was held to be satisfied by the allegation that defendant carrier was beginning an unlawful undertaking which might prove deleterious to complainant as well as to the public interest in securing and maintaining a proper railroad service without undue loss; that the bill contained enough to show the intended action might directly and

seriously affect the project which complainant was undertaking in good faith. This Court then said that there was enough to give the latter a standing of a "party in interest" within the intendment of the Transportation Act.

We believe that this Court's intent in the case of *Western Pacific California Railroad Company* v. *Southern Pacific Company, supra,* in using the words "directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation," must be read in the light of this Court having in the immediately preceding language said that the complainant must possess "something more than a common concern for obedience to law" as showing that this Court intended no narrow interpretation of what may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Particularly is this true in view of the fact that the Transportation Act itself is a highly remedial Act intended to provide all parties injured or threatened with injury as a result of its violation, with a remedy. This Court has said in the case of *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, at pages 311-312:

> "The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

In enacting this highly remedial legislation Congress did not have in mind only the providing of a remedy for competing railroads, but on the contrary, intended primarily that the Act should protect the public and those

of the public who might suffer some injury or damage peculiar to themselves as contrasted with a mere common concern for obedience to law. It was to this latter class, i. e., those who might suffer some injury or damage peculiarly to them, that Congress entrusted the right to proceed by court action to call a halt to actions which might well result in great public waste. Concern for the public welfare and an evincing of the intent of Congress not to restrict too narrowly those who might act to prevent public waste is found in *Western Pacific Railroad Company* v. *Southern Pacific Railroad, supra,* at p. 277, wherein this Court said:

> "* * * that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *New England Divisions Case,* 261 U. S. 184; *Chicago Junction Case,* 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331. The Act sought, among other things, to avert such losses."

The fact that in the case of *Western Pacific California Railroad Company* v. *Southern Pacific, supra,* and the cases cited therein, a railroad happened to be the complainant, does not rule that others designated in the Transportation Act are precluded from bringing the action. If it had been the purpose of Congress to limit the right to bring injunctive actions of this character to the United States, the Interstate Commerce Commission, or any commission or legislating body of the state or states affected, or to any railroad whose territory is

invaded by another carrier, there would have been no need for the addition of the following phrase of the section reading, "or *any* party in interest." By common usage and ordinary understanding, the phrase "any party in interest" has always had a broad and comprehensive meaning. When this is considered together with the purpose of the Transportation Act, Congress must have intended thereby to extend and not to limit those who might bring or join in the action.

This Court, in the case of *Atchison, etc., Ry. Co.* v. *Railway Commission of California,* considered the question of whether or not the city of Los Angeles, California, had the right to invoke the power of the Interstate Commerce Commission to issue a certificate authorizing an extension of a railroad line or whether this right might be invoked only by carriers. On page 393 of that opinion this Court said:

> "It is urged that paragraphs 18 to 20 of Section 1 of the Interstate Commerce Act give the Commission no power to issue such certificates except upon application of the carriers, and that the certificates were also unauthorized under paragraph 21 of that section.
>
> The provisions of these paragraphs (18 to 21) contain no such limitation as that suggested. While they relate 'to the construction, acquisition, extension and abandonment of a railroad,' and 'deal primarily with rights sought to be exercised by the carriers' (*Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *United States,* 275 U. S. 404, 408) these paragraphs do not exclude appropriate action by the Commission upon applications by those who have a proper interest in the subject matter, although they are not carriers."

The city of Los Angeles was held to be a party in interest and entitled to maintain its action.

In the case of *Town of Inlet* v. *New York Central Railroad Co.*, (D. C. N. D., N. Y., 1934) 7 Fed. Supp. 781, the city of Inlet brought a suit in equity to annul a certificate of the Interstate Commerce Commission authorizing the abandonment of a line of railroad. The right of a city to bring such a suit was not even questioned.

Thus this remedial Act has as its purpose the protection not only of competing railroads but the protection of the public with particular regard to shippers and any others, such as Kansas City, Missouri, so situated that they might suffer a tangible and reasonably direct injury by an unauthorized, and therefore unlawful, extension which brings some material change in an existing transportation situation. While Congress undoubtedly intended to protect the general public from such public waste as often results from such changes, it has placed the enforcement of the Act in the hands of those who possess something more than a common concern for obedience to the law and who may, because of their peculiar circumstances, find themselves directly and adversely affected by the change.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 638, this Court said, "The Act was passed for the protection of those who pay or bear the rates." See also *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 210.

This Court said, in *Colorado* v. *United States*, 271 U. S. 153, 162, "The certificate issues not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination."

In conformity with this purpose, it is the policy of the Interstate Commerce Act and related statutes to permit cities, commercial organizations and shippers to participate not only in proceedings before the Commission, but also in those before the courts where the application of these statutes is involved. See *United States* v. *Merchants, etc., Assn.*, 242 U. S. 178, l. c. 188. Any person claiming to be damaged by an interstate carrier may either make complaint to the Commission or bring suit in a Federal District Court (Title 49 U. S. C. A., Sec. 9). Any person, firm, corporation, company, association, mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal corporation, may make complaint to the Commission regarding a violation of the statute [Title 49 U. S. C. A., Sec. 13 (1)]. In proceedings before the Commission or before a District Court to put a stop to rebates and concessions, all persons interested in or affected by the rate, regulation or practice under consideration may be made parties (Title 49 U. S. C. A., Secs. 42, 43). Communities, associations, corporations, firms and individuals who are interested in a controversy before the Interstate Commerce Commission or in any suit brought under the provisions of Sections 20, 43 and 49 of Title 49 may intervene in such suit at any time after its institution; and the Attorney General may not discontinue such suit over the objection of such intervener, but the intervener may prosecute, defend or continue the suit irrespective of the action or nonaction of the Attorney General (Title 28 U. S. C. A., Sec. 45a).

Other Federal Courts, as well as this Court, have recognized that the phrase "parties in interest" is not confined to railroads. In the case of *Detroit & M. Ry. Co.* v. *Bowne City, etc., Co.*, 286 Fed. 540 (D. C. E. D.,

Mich.), one of the plaintiffs, who was an owner of land that was sought to be condemned, brought suit as a party in interest, and the court held (Syl. 4):

> "A railroad company with which a proposed extension by another company will come in competition, or the owner of land over which such extension will pass, is a 'party in interest,' within the meaning of Interstate Commerce Act, Sec. 1, Par. 20, as amended by Transportation Act, Feb. 28, 1920, Sec. 402, and may maintain a suit to enjoin construction of such extension in violation of the Act."

In *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, this Court held that a company operating a ferry within a state under a state charter was a party in interest under paragraph 20 of Section 1 of the Transportation Act and thus capable of instituting suit for the purpose of annulling an order and certificate of the Interstate Commerce Commission granting permission to a railway company to extend its line by a ferry over the same waters, and for the purpose of enjoining the railway from constructing and operating such proposed ferry where it appeared from the bill that such action might directly and adversely affect the welfare of the plaintiff by changing the transportation situation. On page 390 of the opinion, this Court said:

> "Considering *Texas* v. *Eastern R. Co., supra; Colorado* v. *United States,* 271 U. S. 153; *Western Pacific California R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47, and *Transit Commission* v. *United States,* 284 U. S. 360, it must be held that appellant is a 'party in interest' within the meaning of the statute capable of instituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation."

While, as stated previously in this brief, if the Union Pacific Railroad Company had applied for a certificate of convenience and necessity for this proposed extension, Kansas City, Missouri, would have been allowed, under the accepted interpretation of the Transportation Act, to appear and oppose the issuance of such certificate, where, however, the Union Pacific Railroad Company has failed to apply to the Interstate Commerce Commission for the certificate, the only remedy given to those to be affected by the contemplated action of the Union Pacific Railroad Company is that given by paragraph (20) of Section 1 of the Transportation Act. In *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry. Co.*, 270 U. S. 266, the court, at page 273, said:

> "* * * A party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete."

Also in the case of *Powell* v. *United States*, 300 U. S. 276, this Court held that the question of the right of a railroad to construct or operate a track without first securing a certificate cannot be raised by instituting a proceeding before the Commission under the Interstate Commerce Act, but that the remedy must be found under Section 1, paragraph (20) of the Transportation Act.

Since Kansas City has the right and opportunity to be heard by the Interstate Commerce Commission upon the question of whether or not the proposed extension would serve the public convenience and necessity if the Union

Pacific Railroad Company had applied for such certificate, as under the Act it had the duty to do, then it would seem necessarily to follow that the City should have the right to enjoin the unauthorized, and thus unlawful, action of the Union Pacific Railroad Company until such time as it does make proper application in a proceeding wherein Kansas City would have the undoubted right to represent its interests. Particularly should this be the case where Kansas City is in the position of suffering a direct and adverse effect by the material change made, or to be made, in the transportation situation.

The court below held that although the proposed extension of the Union Pacific Railroad Company's line may adversely affect the petitioner's welfare, it will not do so directly, but only indirectly and consequentially. Petitioner submits that its welfare will be directly and adversely affected, as is revealed clearly by the motion and intervening petition. As was stated by Judge Kimbrough Stone in his able dissenting opinion in this case (R. 44):

> "As to appellant Kansas City, Missouri, the allegation of financial loss is in taxes through diminution of real property values and possible movement of the present produce merchants from the city to the vicinity of the contemplated market in Kansas City, Kansas. Also loss through the situation that it (the city) is now erecting a new market structure at considerable cost. It seems to me these allegations are of sufficient definite and adverse financial effect to bring the city within the statute.
>
> "I cannot agree that the proposed extension by defendant does not directly affect complainants and intervener. It is quite evident from the complaint and from the offered intervening petition (1) that plaintiffs and intervener will be financially affected

by the proposed rival market; and (2) that such rival market cannot come into existence without this extension by defendant.'"

No purpose would be served by restating at this point in the brief the allegations of petitioner's motion and complaint. Those provisions clearly allege facts revealing a direct financial loss to petitioner as a direct result of the extension or operation thereon which will bring about a material change in the transportation situation. The produce terminal in question, under the allegations of petitioner's motion and proposed intervening petition, is being built by Union Pacific Railroad Company and Kansas City, Kansas. The extension in question is an integral part of the enterprise. The extension in question, the petition alleges, will be the cause, among other things, of a lessening in value of the market property owned by Kansas City, Missouri; of a loss of efficiency of railroad service to the territory now adequately served, which reasonably might bring about higher rates; of a loss to petitioner of revenues from its said City Market properties; of a diversion of persons engaged in business at the Kansas City, Missouri, Market, from said Market to the proposed food terminal in Kansas City, Kansas, thereby resulting in a loss to Kansas City, Missouri; of the personal and occupation taxes and licenses now being paid by these merchants and produce men; a loss to petitioner from a diversion of freight and other revenue from Kansas City, Missouri; a reduction in value of bonds issued by Kansas City, Missouri, for construction of a new market in conjunction with its present market; a serious interference with the use and operation of tracks, loading docks and other appurtenances used by railroads serving Kansas City, Missouri, and

impairing the adequacy of the present transportation system of Kansas City, Missouri; the unnecessary duplication of railroad facilities at a great cost.

Petitioner submits it is impossible to conceive of a case wherein a city would be more directly and adversely affected by an unauthorized extension than under the facts set forth in petitioner's motion and proposed intervening petition. If petitioner is without sufficient standing, then no one, other than a competing carrier, would ever be deemed to be a "party in interest" and thus entitled to maintain such a suit. The decision of the court below amounts to a holding that a city cannot be a "party in interest," entitled under the Interstate Commerce Act to maintain an action to enjoin an unauthorized extension of line. This construction of the statute is erroneous in face of the purpose of the statute and the previous decisions of this Court. It is inconsistent with the purposes of Congress in passing the Interstate Commerce Act. The action of Union Pacific Railroad Company in promoting the building of a food terminal and in constructing terminal facilities and extending its railroad lines, is the direct cause of an immediate and direct financial loss to petitioner. Without this extension no such loss would arise. The motion to intervene and the proposed intervening petition clearly state that the combined action of Union Pacific and Kansas City, Kansas, in constructing and operating the food terminal and the railroad extension, which is an integral part thereof, will cause, or may cause, the direct financial loss to Kansas City, Missouri, which loss is set out in detail therein.

Judge Stone cited *Western Pacific California Railroad Co.* v. *Southern Pacific Company, supra,* as being the holding of this Court that *direct financial loss caused to a party was sufficient to bring that party within the*

*terms of the Act,* whereupon he said that such financial loss is clearly stated in the motion and the intervening petition of petitioner.

Petitioner urges that its complaint and its motion to intervene show that the construction and operation of the proposed extension will directly and adversely affect property interests and rights of petitioner; will cause it to suffer a financial loss; and will bring about a material change in the transportation system which will constitute an unnecessary burden upon interstate commerce and directly and adversely affect the welfare and rights of petitioner.

**2. Both the intervening motion and the proposed intervening complaint are sufficient in law and state a claim upon which relief can be granted.**[3]

Petitioner believes that it has shown under the preceding points that the petitioner is a party in interest within the meaning of the Act and is entitled to intervene in and maintain this action. This being true, the motion to intervene and the intervening complaint are sufficient in law, and state a cause of action upon which relief can be granted. Petitioner believes that there can be no question but that the motion to intervene and the proposed intervening complaint amply meet the requirements of the new rules of civil procedure for District Courts and are sufficient in law, and state a cause of action entitling petitioner to have the case heard upon the merits. Peti-

[3]New Federal Rule 24 provides for intervention of right and a permissive intervention. Intervention of right is permitted upon timely application (1) when a statute of the United States confers an unconditional right to intervene, or (2) when the representation of applicant's interest by existing parties is, or may be, inadequate and applicant is, or may be, bound by the judgment in question. Permissive intervention is permitted upon timely application (1) when a statute of the United States confers a conditional right to intervene, or (2) when an applicant's claim or defense has the main action for a question of law or fact in common.

tioner believes that to reach a contrary conclusion it is necessary either to disregard the allegations of the complaint or to hold, as a matter of law, that a municipal corporation cannot be adversely affected by a material change in a transportation situation vital to its economic survival and to its existing property interests and rights.

## VII.

### Conclusion.

Petitioner believes that it has, by its motion to intervene and its proposed intervening petition, presented to the District Court on the pleadings its right to intervene and maintain the action. The only objection raised to the petitioner going to trial is based on the contention that petitioner is not a party in interest under paragraph (20) of Section 1 of the Transportation Act.

In view of the purpose and intent of the Transportation Act, and in view of the former decisions of this Court, petitioner urges this Court to hold that it is a party in interest entitled to intervene in and maintain the suit in question. In other words, petitioner urges this Court to find that Congress meant by the term "any party in interest," a municipal corporation who, under the circumstances of the motion and petition here, has suffered, or will suffer, a direct, adverse, immediate loss by this unauthorized, and thus unlawful, extension of a line of railroad causing a material change in the transportation situation.

Petitioner further urges that the opinion and judgment of the court below should be reversed so that the petitioner may be permitted to intervene and to offer proof of its interest and to show in what respects and to what extent its welfare may be directly and adversely affected

by the unlawful extension of the railroad lines of Union Pacific Railroad Company, and what direct and adverse loss the petitioner will suffer.

Respectfully submitted,

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